No. 22601

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant

v.

COLONEL FRANK CHILDS AND
ELIZABETH CHILDS, HUSBAND AND WIFE, ET AL.,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

APPELLEES' BRIEF

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JURISDICTIONAL STATEMENT

The jurisdiction of the court below was invoked by the United States pursuant to 28 U.S.C. 1345 (R. 258). Jurisdiction of this court is claimed to be invoked by the Government pursuant to 28 U.S.C. 1291.

STATEMENT OF THE CASE

The United States of America, as Appellant adopts in its brief its own version of the facts, some of which were disputed; some of which are stipulated to (R. 399-404), and some

of which are inferences which cannot be substantiated by the evidence. The Government largely ignores the Findings which the lower court has made in resolving the disputed facts, and, in effect, from partial quotations from the Reporter's Transcript, attempts to present its case on the facts from portions of the dead record as if the trial and the trial court's Findings had never occurred.

The trial court entered Findings of Fact and Conclusions of Law (R. 405-417), and in addition, has stated by a transcribed Oral Decision dated March 17, 1967, while the trial was still fresh in the court's mind, the compelling reasons which the court felt would control its decision and pursuant to which Findings of Fact and Conclusions of Law were ordered filed by the respective parties. Indeed, the Findings of Fact and Conclusions of Law entered by the court (R. 405-417) were supplemented by the court's Oral Decision of March 17, 1967 "which served to support the Findings as made herein." (F.F. XVI, R. 415).

The Government's Statement of Facts in its opening paragraph concludes that Thomas Childs and his wife conveyed, in 1947, to the United States in trust for the Papago Tribe, 640 acres, reserving life estates in the grantors. The testimony and evidence will show conclusively that the Childses, as grantors, had no intention of entering into a transaction as

the Government contends. The transcribed Oral Decision of March 17, 1967 and the Findings of Fact (R. 405-417) relate in concise and chronological form the facts which the court found to exist from the evidence and its conclusions based thereon.

As will be developed further by the Appellees, it is their position that the Government's contention and position is not in accordance with the law and is unconscionable in that it attempts to take away from the Appellees, being children and grandchildren of Tom and Martha Childs, all of the property rights which had been in the family since the 1800's (R. 406). It is conceded by both parties that Tom Childs, because of his advancing years, sought an arrangement whereby the ranch properties could be secured against mismanagement and indeed, Childs consulted a lawyer about making arrangements to insure that his children and descendants would get these benefits. He was informed that it violated the rule against perpetuities (R. 411). Thereafter, and apparently unwilling to accept his attorney's advice, Mr. Childs sought the assistance of the authorities with the Bureau of Indian Affairs.

The Government agents, in the first instance, were laymen who represented to Mr. Childs that they would take care of this matter for him and would cause the necessary instruments to be prepared. Instruments were prepared, and the main issue in the lawsuit is whether or not these instruments manifest the

intentions of Tom and Martha Childs, husband and wife. The trial court had before it the evidence and inferences therefrom to consider, and based upon the record in this case the court resolved all these differences and entered judgment in favor of the Appellees.

The case went to trial on the Amended Complaint of the Government (R. 258), excepting that the accounting alleged in Count II thereof was dismissed. The Answer of these Appellees to said Amended Complaint, less the accounting, serve as the pleadings upon which the case was tried (R. 245-6; 271-2).

In addition to the 640 acres of patented land described in the Complaint there are 14½ townships of Taylor Grazing Act Leases, or over 500 sections, that were alloted to Thomas Childs in January of 1939, according to the testimony of Dearl Wallace, Area Manager of the Bureau of Land Management (Tr. 193).

The Papago Tribe, in 1952 and 1953, applied to have this allotment transferred to the Tribe (R. 410), but their application was turned down (Tr. 206) and the application has not been prosecuted. These are the grazing permits referred to in paragraph 9 (1) of the Offer (Ex. C), which provision states:

> "1. The offerers will cooperate with the grantee to the end that the grazing permits at present appurtenant to the lands described herein may be acquired by the grantee."

The additional contentions of the Appellees in this brief are that Thomas and Martha Childs would not want to also divest

their children and descendants of any rights in these Taylor Grazing Leases.

After the death of both Tom and Martha Childs, the United States Government continued to pay to Colonel Childs, Executor and son of Thomas Childs, or the lessees, the sum of $1,750.00 annually from 1951 and since (Tr. 196) for a portion of the allotment withdrawn from grazing and used for a government bombing range (Tr. 195). It is interesting to note that the Government filed its Complaint in January of 1964.

A further bit of evidence is contained in the first part of paragraph Third of the Last Will and Testament of Thomas Childs, dated in January of 1951 (Ex. V), wherein the Testator states as follows:

> "Third: I hereby direct that the War Department Lease money being paid to me quarterly at the rate of One Thousand, Seven Hundred and Fifty Dollars ($1,750.00) per annum and which will be due my estate in the event of my demise until the year 1968 be given to my son Colonel Childs (Colonel Frank Childs) to be used for the care and maintenance of the ranches." (Emphasis supplied)

The evidence shows that the improvements, constituting buildings, etc., are also on parcels other than the 640 acres of fee land described in the Complaint. Thus, in his 1951 Will Thomas Childs was devising and bequeathing his interests not only in the patented land, being the 640 acres described in the deed, but the rent from the War Department and other assets distributed in the Decree of Distribution (Ex. X). Suffice

it to say, the Taylor Grazing Act Leases may be in jeopardy by the acts of the Government agents in causing to be prepared the Offer (Ex. C).

Under date of December 5, 1958 the Papago Tribe passed a resolution which enrolled the children of the grantors as members of the Papago Tribe. The evidence shows that this is eleven years after the Offer was executed and when both Thomas and Martha Childs were deceased (F.F. XV, R. 414-415), and that such enrollment was not made within a reasonable time after the execution of the Offer dated February 10, 1947. The Offer provides that it shall remain open for nine months (see paragraph 6, Ex. C).

The Appellant, in its brief, has attempted to seize upon the written documents as being the thrust of their argument, tending to ignore or minimize the other facts in this case. Appellees' contentions throughout this brief are predicated upon the actions of the Government agents; the admissions of the Government agents, and even the overreaching by the Government agents as set forth herein as it pertains to the intentions of the offerers-grantors, Thomas Childs and his wife, Martha Childs

RESPONSE TO SPECIFICATION OF ERRORS IN GENERAL

The Government, in its 15 Specifications of Error, is contending, in general, that the court was not making the proper findings in accordance with the evidence.

The case at hand, of course, is not limited to the documents only and the findings of the court are explainable by weighing all of the matters presented to it.

Appellees believe that this court's decision relating to findings of fact under Rule 52 have been correctly applied by the trial court.

SUMMARY OF ARGUMENT

Unless the trial court's finding are clearly erroneous they cannot be set aside.

The Government, on page 2 of its brief, tries to confine the matters involved in this suit to the "QUESTIONS PRESENTED". A reading of the testimony and an examination of the exhibits will conclusively indicate that the court not only considered the documents but the testimony of all of the witnesses presented by deposition or by interrogatories and answers thereto. The trial court observed the demeanor of the witnesses, weighed their testimony and reconciled the evidence with what was required to substantiate its judgment. Had the court examined only the Offer, the deed and the other exhibits, as the Appellant attempts to limit the court to in its "Questions Presented", then this might have been another lawsuit.

The Government, in attempting to confine the review of this case to the "Questions Presented", is wholly ignoring the

conflicting inferences and has not pointed out where any of the Findings are "clearly erroneous." This court, in LUNDGREN v. FREEMAN, 307 F.2d 104 (CA 9 1962) has construed Rule 52 (a) F.R.Civ.P., which provides that: "Findings of fact shall not be set aside unless clearly erroneous ***." This court analyzed the position taken by Judge Frank in ORVIS v. HIGGINS, 180 F.2d 537 (CA 2 1950) holding that:

> " '(i)f (the trial judge) decides a fact issue on written evidence alone, we are as able as he to determine credibility, and so we may disregard his finding.' (id. at 539) Thus, under this view, direct observation of witnesses is the controlling criterion as to whether the trial court findings should be given weight."

Lundgren goes on further to say "Other courts, however, hold that the 'clearly erroneous' test does mean something, even where the trial was on written instruments and depositions." It appears that the Ninth Circuit has committed itself to the Clark view and the law construing Rule 52 in COMMISSIONER OF INTERNAL REVENUE v. DUBERSTEIN, 1960, 363 U.S. 278, 289-291, 80 S.Ct. 1190, 4 L.Ed.2d 1218. In Duberstein the Supreme Court stated:

> "A finding of fact, to which the clearly erroneous rule applies, is a finding based on the 'fact-finding tribunal's experience with the mainsprings of human conduct'. A conclusion of law would be a conclusion based on application of a legal standard. Many Ninth Circuit cases espousing the Frank view are explainable as applying the rule that courts of appeal need give no weight to a trial court's conclusions of law."

It is submitted that the trial court has correctly applied the guide lines set down by this court, as can be seen from the evidence in this case. It is submitted that the trial court's findings are based on the court's experience with the "mainsprings of human conduct."

This court again, in WINEBERG v. PARK, 321 F.2d 214 (CA 9 1963), has stated that findings of fact made by the trial court may not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. See also L. A. SHIPBUILDING & DRYDOCK CORP. v. UNITED STATES, 289 F.2d 222 (CA 9 1961). The court, in this later case, indicated "It is not our function to re-try questions of fact determined by the trial court, even upon uncontradicted evidence where differing inferences may reasonably be drawn from it." See also 2-B Barron and Holtzoff Federal Practice and Procedure, Secs. 1131-1133.

The testimony and evidence surrounding Martha and Tom Childs' concern for their twelve children and the ranch properties is clearly and conclusively established by the testimony of Denzil Tyler, a portion of which testimony is as follows

> "A Mr. Childs told me that he owned a ranch in the vicinty of Ajo, that he was married to a Papago Indian woman, that they had a number of children, that it was his desire to establish an arrangement whereby after his death the property

of his ranch and whatever other assets he had would be held in trust or some such arrangement for the benefit of his descendants. He further stated that he felt his children were not capable of handling the ranch, that it would have to be handled by somebody else, but he wanted them to have the benefit of it for as long as -- this is something which I have been able to remember since my deposition was taken -- for as long as the children had Indian blood in them in excess of one-twelfth. That after they had acquired enough non-Indian blood not to have as much as one-twelfth, that he felt they could handle their own affairs, but until then the ranch was to be their means of support but under the control of someone other than the children." (Tr. 140-141)

A portion of the testimony of C. H. Hocker also shows the feeling that Mr. Childs had for his family, from the following testimony:

"Q You told us you thought Mr. Childs was the most wonderful man you ever knew. Do you know anything about his feeling for his family?

"A He loved his family very much. He gave all his attention to his family." (Tr. 169)

Mr. Hocker, under cross-examination by the Government's attorney, stated as follows:

"Q What did he tell you a year or two before that?

"A Well, that he was going to, that he was going to protect his children because his children, he was afraid -- he told me, maybe two years, three, I can't state a day on that.

"Q Yes, sir.

"A He told me he was going to do it.

"Q Going to do what?

"A Going to get, turn it to the Tribe to take the ranch and be kind of guardian on the ranch, but he expected it always to belong to his children." (Tr. 175-176)

The testimony of Jack Weidner, who had an association of long-standing with Tom Childs, stated as follows:

"Q Mr. Weidner, did you get to know him well enough to know what his feeling was toward the ranch?

"A Yes, sir.

"Q What was it, sir?

"A He loved that ranch very much and he wanted it -- in other words he felt it security for himself and his family and he felt it was a cover-up for anything.

"Q Now, how about his children, did you know him well enough to know how he felt about his children?

"A He loved his children an awful lot." (Tr. 184-185)

The only inference that the court could draw from this testimony is that Mr. Childs had a great love for his ranch and had a great love for his family and children. It is submitted that the other inference which can be drawn therefrom is that he did not intend to make an improvident disposition of his ranch properties, but on the contrary, intended that the fruits of his efforts and that of his father, from whom he acquired the homestead rights (R. 400), would descend and be transferred to his children and their descendants. It is also to be inferred that there is no probative evidence from an impartial

witness that the Childses ever intended to dispose of their property so that upon their death their children had no fee interest for themselves or their descendants.

The trial judge was presented evidence which was not entirely harmonious or consistent with the transaction described by the Government agents. After Tom Childs' counsel advised him that the arrangement he sought violated the rule against perpetuities he discussed his intentions with Joe A. Wagner (Tr. 394) and Arthur A. Lusher (Tr. 57-59). As a result of this conference the Offer to Sell Land to the United States (Ex. C) was prepared, which was ultimately executed by Thomas Childs and by Martha Lopez Childs, the latter by placing her thumbprint thereon, and by Joe A. Wagner and Arthur A. Lusher. There is nothing in the record from the mouths of the Government witnesses, including the Government attorney, Mr. Sanford, which shows what explanation was given to the offerers as to exactly was was being signed by them. It is interesting to note that in Exhibit C, being the Offer, there appears the following opening sentence:

> "WHEREAS, the United States of America is acquiring land for Indian purposes under the provisions of the Act of June 18, 1934 (48 Stat. 984) as a donation." (Emphasis supplied)

This evidence that the land is being acquired as a donation was considered by the judge because the trial court found that only the sum of One Dollar was paid and that no other valuable

consideration passed to the grantors (F.F. XV, R. 414). The trial court was also confronted with a provision in said Offer, being paragraphs 9 (5) and (6) which read as follows:

> "5. As part of the consideration of this conveyance it is understood and agreed that the children of the grantors shall be granted a preferential right of assignment of the use of the buildings and existing improvements located on the lands described herein."
>
> "6. Descendants of prior deceased children of the grantors shall be enrolled as members of the Papago Tribe provided that they are one half or more degree of Papago blood."

The record is absent any testimony as to what was explained by the Government attorney or agent what said provisions meant. The trial court was not furnished any evidence by Government witnesses explaining what was mean by the term "preferential right of assignment of the use of the buildings and existing improvements ***." The words "preferential right" are words of art (see 3d Dec. Dig. 425, Indians 13(4)) but are ambiguous and uncertain with reference to the rights of Childs' children allegedly granted in Exhibit C.

The evidence further shows (Tr. 60) that paragraph 9 (6) (supra) was a mistake and had no meaning because there were no prior deceased children of the grantors. The following testimony of Mr. Lusher conclusively establishes this information and knowledge was thereby made known to Appellant:

By Mr. Barber.

"Q Mr. Lusher, did he tell you that all of their children who had any issue were living? In other words, children who had children were still alive.

"A The best I can recall, I do not believe that such a matter was brought up." (Tr. 59)

* * * * * *

"Q (Mr. Mr. Barber) I will reframe the question.

"You have already told me the purpose of these conditions was to try to convey in writing legally what Mr. Childs wanted. What do you understand condition No. 6 to mean, sir?

"A Just what it says, that any descendants of prior deceased children shall be enrolled as members of the Papago Tribe. I am quite vague on that myself as to discussion and such.

"Q Does it indicate to you that Mr. Childs at that time had a deceased child who had living children?

"A It does.

"Q <u>And if that is shown to be untrue, then that is a mistake, is it, sir</u>? (Emphasis supplied)

"A <u>It so appears</u>." (Emphasis supplied) (Tr. 60)

Thereafter, on May 6, 1947, Thomas and Martha Childs executed a warranty deed (Ex. A) to the United States of America in trust for the Papago Tribe to the 640 acres in question, subject to reservation of a life estate in the grantors. Again Martha Childs executed this instrument by affixing her thumbprint thereto. Nowhere on said conveyance is there any recital

nor are there any conditions to connect it to the Offer (Ex. C). Thus the Government wishes this court to determine that the warranty deed and the Offer are the primary things to be considered in this appeal. Even these documents do not purport to carry out the grantors' intentions, and it is interesting to note the testimony of Burton Ladd, Superintendent of the Papago Agency, as follows:

By Mr. Barber.

"Q Do you remember my asking you this question and you giving me this answer, Mr. Ladd: 'Question: Doesn't an outright deed in trust to the Papago Tribe defeat Mr. Childs' intent and purpose?' 'Answer: The Government couldn't have accepted a deed for the Tribe in any other form.'

"Didn't I ask you that question, and didn't you give me that answer, sir?

"A Yes." (Tr. 350)

Again, on cross examination, Mr. Ladd further testified as follows:

"Q Do you know now as you sit there whether or not he seemed to convey that impression to you, that all he had to do if he became dissatisfied, was write a letter and withdraw that so-called offer to sell and the deed that followed?

"A In our conversations, as I remember them, he indicated that he felt that the land part had been taken care of by the previous arrangement.

"Q I understand that, but didn't he indicate in these conversations that that could be changed at his discretion?

"A I couldn't say that it could or not.

"Q But you did get that impression?

"A My only personal feeling was that that would be possible, not based on any legal --

"Q Do you know --

"MISS DIAMOS: If the Court please, I don't think the witness has finished his answer.

"A My own feeling was that wasn't based on any legal background, just moral.

"Q I understand. You were superintendent at that time, were you not?

"A Yes." (Tr. 343-344)

The testimony of Mr. Ladd can be rationalized in two ways. One, that the Childses did not intend that the documents were delivered in law; that is to say, that they did not intend that they were bound thereby. The other view is that the Childses could withdraw these instruments if they so desired, which would negate the transaction evidenced by the Offer and deed.

This inference is consistent with Thomas Childs' conversation with his attorney, Denzil Tyler, in July of 1950, part of which conversation related by Mr. Tyler is as follows:

By Mr. Barber.

"Q Did he say anything to you about a deed, a trust deed being with the Council?

"A He told me that he had left a deed with someone in the Tribal Council. I don't think he used the word trust, but I gathered he had left it with them in a fiduciary capacity to hold for

him until details could be arranged whereby they would carry out his desires.

"Q Did he tell you what the deed allegedly was to do or pass title to?

"A Well, I don't remember now whether it was all or a part of his land.

"Q Did you have any concern about making a Will with an arrangement, trust arrangement if there was an outstanding deed; at that time did you have any concern?

"A Well, it was his desire that the Tribal Council handle this and the deed was with them, but he was sure that the deed was not effective until and unless details were arranged.

"Q Did you discuss that part with him?

"A He voluntarily told me that he was sure he could get the deed back any time he wanted it." (Tr. 141-142)

The state of mind of Thomas Childs as evidenced by the testimony of Denzil Tyler and the witness for the Government, Burton Ladd, certainly confirms that this arrangement could be recalled or revoked by the withdrawl of the Offer and deed. This is analogous to the old portrayal in western movies that he who acquires the paper deed to the ranch acquires the ranch, even though stolen from the safe.

The Government contends that it did not stand in a fiduciary relationship with a non-Indian, Thomas Childs, Jr. The Government agent, Joe Wagner, who was one of the signers of the Offer (Ex. C), testified as follows:

"Q Mr. Wagner, I took down some of the remarks you made about your association with Mr. Childs, and I want to repeat some of them, and, if I am mistaken, you readily tell me so, will you?

"Now, in regard to meeting with him, in response to a question asked by Miss Diamos, you said, 'We met many times.' You said that, didn't you?

"A That's right.

"Q And you also said he called you Cy.

"A May I also state that most of the time I met with him was at his request, either by telephone or by letter?

"Q You were very good friends, weren't you?

"A Let's say trustful friends.
(Emphasis supplied)

"Q He had a lot of confidence in you, didn't he, sir?

"A Yes, sir." (Tr. 394)

On other occastions the Government agents had prepared a Will for Thomas Childs to sign. It can be readily seen that the Government, through its agents, stood in the position of a quasi fiduciary as concluded by the court (C.L. II, R. 415). It is established from the evidence that a confidential relationship existed between the grantors and the agents of the Government and of the Papago Tribe, who advised and worked with the Grantors, prepared the instruments in question, and purportedly advised them of the legal import thereof and furnished

explanations, although the details thereof are aliunde the record. The Grantors sought the advice of the Government agents because they were ignorant of the legal questions involved; were not on the same level or even similar in intelligence and training with the Government agents, and had absolute trust and confidence in them to assist the Grantors in establishing an arrangement which would carry out their intent. Martha Childs was unable to understand the transaction, and could not even sign her name except by thumbprint. The Offer was not explained to her in Papago by Mr. Sanford, but according to the Government's testimony, this was done by Tom Childs after it was explained to him by Mr. Sanford (Tr. 386). When it came time for the execution of the deed Martha Childs, in the presence of her husband and others, including Tom Segundo, the Chairman of the Papago Tribal Council, who was to serve as an interpreter, was concerned about executing any documents, and the testimony of Philip Childs, present during the signing, is as follows:

> "Q (By Mr. Barber) Tell us what your mother said and what Segundo answered back to your mother.
>
> "A Well, I was up there and my father says, 'Come on over here, Phil, and your mother is going to put her thumbprint here," and Segundo said, 'If you put your thumbprint on there --' My mother said, 'I am afraid if I put my thumbprint on there that you will take the ranch away,' and Segundo said, 'We will take care of the boys,' and she did.
>
> "Q I wish you would repeat that because I didn't get some of the words. First tell us what your mother said.

"A Well, my mother said, 'If I put my thumbprint on there, you won't take my ranch away from the boys?'

"Q 'You won't'?

"A Yes.

"Q What did Segundo say?

"A Segundo said, 'No, we will take care of your boys.'

"Q Now, at that time -- oh, by the way, what language were they conversing in?

"A They were talking in Papago.

"Q At that time and place, did your father say anything to you in English about some papers that were there?

"A Yes, he said, 'Phil, the deeds to the ranch will be taken care of by the Papago Tribe.' He asked, I think it was Claymore he asked that, 'What would you charge me to take care of this deed for the boys?' And he says, 'That will be up to the Papago Tribe.' Segundo -- and my father said, 'What would you charge the boys?' Segundo said, 'Nothing. It will be there any time you want this deed.' My father said, 'Did you get that, Phil?' "
(Tr. 266-267)

With the facts and the legal and proper inferences that the trial court drew therefrom the basic arguments of the Government appear to be predicated upon challenging, but without pointing out where the findings are clearly erroneous, those facts found by the trial court. It is submitted that the Government has not satisfied the requirements of Lundgren, Duberstein and Wineberg (supra).

RESPONSE TO SPECIFICATION OF ERRORS 2, 3, 4, 9, 11 and 12

The Government has covered four areas in its Specification of Errors. Specification of Errors 2, 3, 4, 9, 11 and 12 are herein designated as the "first area" and are predicated upon the deed, the Offer and the legal effect of this transaction.

Appellees will respond to all Specification of Errors designated by Appellant and will show the evidence relied upon by Appellees as supporting the challenged finding, even though the Government has not, in all cases, stated with particularity where the Findings of Fact and Conclusions of Law are alleged to be erroneous as required by Rule 18 (d) of this court.

SUMMARY OF ARGUMENT

> The trial court has properly found on a preponderance of the evidence that the deed was ineffective because it lacked consideration; that it failed for want of consideration, and that condition 4 of paragraph 9 had not been performed; that said documents were ambiguous and created no more than a revocable trust. That any trust that may have been established was revoked by the execution of the Last Will and Testament of Thomas Childs on January 20, 1951.

The Appellees, on pages 43 to 50 of this brief, have pointed out that the failure of enrollment of the Childs' children constituted a failure of consideration upon non-performance. The court, in FARRELL v. THIRD NATIONAL BANK OF NASHVILLE,

101 S.W.2d 158 (C.A. Tenn. 1936), has stated:

> "*** Failure of consideration is in fact simply a want of consideration, and if a partial failure of consideration is such as to effect the whole contract, then it may be grounds for rescission."

The court went on to say:

> " 'Aside of enactments of this kind, the general rule appears to be that a partial failure of consideration will justify a rescission or cancellation of an obligation in equity if the contract is entire and the consideration therefore not apportionable.' "

The trial court has stated that the conveyance must fail for lack of consideration because it found that Martha and Tom Childs received nothing in return for parting with such valuable properties. Nor did the United States, as promissor, suffer any detriment. The United States did not give adequate consideration for the lands. The United States gave one dollar but no other "valuable consideration" as appears in the record (F.F. XIV, R. 414).

The trial court had to examine the deed and Offer (Ex. A and Ex. C) in the environment in which said documents were created. The court found that apart from the language appearing in said documents, there is no evidence that Martha and Thomas Childs intended to convey irrevocably the land to the United States in trust and reserve only a beneficial interest for their own children. Indeed, the court observes that the evidence sustains the finding that Mr. Childs sought to establis

a trust (without accurate knowledge of what a trust was) (F.F. XIII, R. 413).

The testimony of Mr. Tyler is illustrative of Mr. Childs state of mind, as is evidenced by the following testimony:

By Mr. Barber.

"Q Did he say anything to you about a deed, a trust deed being with the Council?

"A He told me that he had left a deed with someone in the Tribal Council. I don't think he used the word trust, but I gathered he had left it with them in a fiduciary capacity to hold for him until details could be arranged whereby they would carry out his desires." (Tr. 141)

In reading over all of the findings of the court, the court correctly went outside the documents to determine the intent of the parties. Arizona follows the general principle that the court may go outside the document to construe the trust and determine the intent of the parties.

If the language of a trust is ambiguous the Court may go outside the document to establish the intent. STATE v. COERVER, 100 Ariz. 135, 412 P.2d 259 (Supreme Court of Arizona in Banc) at page 262, 263, states:

"*** A general principle of law applied to either a private or charitable trust, is that when a trust is created by a written instrument, the intention of the settlor is ascertained from the express language of the instrument, and court will not go outside the instrument in an attempt to give effect to what it conceives to have been the actual intent or motive of the settlor. If, however, the intention is not plainly expressed,

> or if the language used is ambiguous, there are well-established rules which courts will invoke to aid them in the construction of the instrument. See Olivas v. Board of Nat. Missions of Presbyterian Church, 1 Ariz. App. 543, 405 P.2d 481 (1965).
>
> "One such rule is that the determination of the intention of the settlor, where construction is necessary, will be made in light of surrounding circumstances at the time of execution of the deed. The court places itself in the position of the settlor at the time of creation of the trust and interprets what he has said or done in light of his environment at that time. In the instant case the language used does not plainly express the intention of the grantor, and, therefore, it is necessary for us to look at circumstances surrounding the execution of the deed to determine if a trust was intended, and if so, the nature of any trust so created, its terms and its beneficiaries."

Parol evidence may be used to establish the true intent of the parties. CHANTLER v. WOOD, 6 Ariz. App. 134, 430 P.2d 713 (Court of Appeals of Arizona, July 25, 1967, Rehearing Denied Aug. 9, 1967, Review Denied October 3, 1967) at page 718, states:

> "*** Appellants other contention that in the quiet title action plaintiffs may not divest them of title solely upon the basis of parol evidence is answered by the fact that the parol evidence rule does not apply to a situation where there was a prior agreement and by reason of mutual mistake of fact, instruments have been so framed as not to express the true agreement of the parties. Such evidence is admissible for the prupose of proving the content of the pre-existing express agreement of the parties to the instrument. Berger v. Bhend, 79 Ariz. 173, 285 P.2d 751 (1955); McNeil v. Attaway, 87 Ariz. 103, 348 P.2d 301 (1960); Hollars v. Stephenson, 121 Ind. App. 410, 99 N.E.2d 258 (1951)."

The subsequent conduct of the parties can be examined to determine their understanding and intent. GRAHAM v. VEGETABLE OIL PRODUCTS COMPANY, 2 CA-CIV 36, 401 P.2d 242 (Court of Appeals, April 28, 1965. Rehearing Denied June 9, 1965, Review Denied July 6, 1965) at page 247, states:

> "We agree with the lower court. The language of Webb's purported promise was not unequivocal and requires resort to extrinsic evidence from which the intention of the parties can be determined. McClave v. Electric Supply, Inc., 93 Ariz. 135, 141, 379 P.2d 123 (1963). Such intention can be ascertained solely from an examination of the circumstances--the deeds must illuminate the words. The subsequent conduct of the appellants in looking to Y-F Ranches for payment indicates that they continued to regard Y-F Ranches as the debtor. ***"

Considering that part of the environment or circumstances that existed in this case are as follows: that the Childses wanted to protect the children from their own folly (Tr. 140-141); that the Childses intended to keep the ranch intact and avoid breaking it up so it would be secure for their children and descendants (Tr. 140-141); that Childs was advised that this arrangement violated the rules against perpetuities (Alton Netherlin Deposition, page 11, R. 427); that the Government agents intended to help him with his problem (Tr. 36); that the Government agents prepared documents that would defeat the intent of Mr. and Mrs. Childs, but could accept these documents as being the only statutory provision permitted (Tr. 350); that Thomas Childs had great love for his ranch and children

(Tr. 184-185); that Childs felt that because of the drinking problem that his children might not be able to manage the ranches with the necessary business acumen (Terry Deposition, page 13, R. 428); that the Childses left an impression with Mr. Ladd that the Offer and the deed and arrangement could be withdrawn by them (this according to the testimony of the Government's witness, Burton Ladd) (Tr. 343-344), the trial court found that the Offer and deed and the transaction were ambiguous and correctly applied the law in attempting to search out the true intent of Mr. and Mrs. Childs.

Perhaps the most ironic part of the whole case in the Government's effort to quiet title to the land described herein is in making come true the prediction of Martha Childs when she told the Papago interpreter "I am afraid if I put my thumbprint on there, that you will take the ranch away." and Segundo said, "We will take care of the boys." (Tr. 266).

The government takes the trial court to task again for its conclusion that the Offer and deed created no more than a revocable trust (C.L. V, R. 416) and also that the Offer and deed were revoked by the execution of the Last Will and Testament of Thomas Childs, executed January 20, 1951 (Ex. V) (C.L. V, R. 416). Appellees have covered, in pages 33 - 43 of this brief, the fiduciary or confidential relationship existing between the contracting parties. Since the court has found that the Offer

and deed are ambiguous, considering the surrounding circumstances (F.F. XIII, R. 413), and further, that the Childses did not intend to divest themselves of the fee to the ranches, this is analogous to the settlor of a trust omitting to insert, by mistake, a provision of revocation. This is succinctly stated in RESTATEMENT OF THE LAW OF TRUSTS (Second) (1959 Ed.), Sec. 330 b, page 133:

> "** If, however, the settlor intended to reserve a power of revocation but by mistake omitted to insert in the trust instrument a provision reserving such a power he can have the instrument reformed (see § 332), or if he was induced to create the trust by fraud, duress, undue influence or mistake, he can have the trust set aside (see § 333).
>
> "If the meaning of the trust instrument is uncertain or ambiguous as to whether the settlor intended to reserve a power of revocation, evidence of the circumstances under which the trust was created is admissible to determine its interpretation. See § 38.
>
> "Where the creation of a trust is evidenced by a written instrument which shows on its fact that it is not a complete integration of the terms of the trust, extrinsic evidence is admissible to show that the settlor manifested an intention to reserve power to revoke the trust. Thus, if prior to the creation of the trust it was orally agreed that the owner of property would transfer it to another person as trustee and that the owner should have power at any time to revoke the trust, and the owner subsequently transfers the property by a written instrument which directs the trustee to hold the property according to the terms of the agreement orally made between them, the settlor has a power of revocation. Compare Restatement of Contracts, § § 226-244."

It has been the position of the Appellees that the Childses did not intend to execute a trust and the trial court has, in

substance, found every essential fact necessary to support this position. One of the fundamentals of contract law is that the documents must be delivered; that is, that they should be delivered in law as well as in fact. In BROWN V. FIRST NATIONAL BANK OF NOGALES, 36 P.2d 174, our court held that parol evidence was admissible to determine the intent of the parties as to whether or not delivery was effected. In ROBINSON v. HERRING, 75 Ariz. 166, 253 P.2d 347 (Ariz. 1953), the court stated, at page 349:

> "*** We further said, to constitute a delivery, there must be not only a delivery but an acceptance and it must appear that the grantor's intention at the time was that the deed should pass title and that he should lose all control over the property conveyed by the terms thereof."

See also PARKER v. GENTRY, 62 Ariz. 115, 154 P.2d 517.

The Restatement of Trusts, supra, at page 135, has this to say about an incomplete trust ineffective because of want of delivery:

> "e. Where creation of trust incomplete. The rule stated in this Section is applicable only where a trust has been created. If the settlor has not taken all the steps necessary for the creation of the trust (see § § 17-73 (Chapter 2)), no question of revocation arises. Thus, if the owner of property makes a conveyance inter vivos of the property to another person to be held by him in trust for a third person, and the conveyance is not effective to transfer the property because of want of delivery of the subject matter of the trust or of a deed of conveyance (see § 32), or because it is a testamentary disposition (see § § 53-58), no trust is created and the property remains in the

owner free of trust. In such cases it is immaterial that the settlor did not reserve a power of revocation, since no trust is created."

RESPONSE TO SPECIFICATION OF ERRORS 8 and 10

The second area covered in the Government's Specification of Errors 8 and 10 refers to the lack of a meeting of the minds between the United States and the Childses and the intent of the parties.

SUMMARY OF ARGUMENT

The court was correct in holding that it was necessary to examine all of the circumstances to ascertain the intent of the parties.

Again the Government takes the trial court to task, citing in support thereof a proposition of law which is quoted from the Hotchkiss case, which, in essence, holds that a contract has nothing to do with the personal or individual intent of the parties unless there is "some mutual mistake, or something else of the sort."

Appellees will show that a mutual mistake or something else of the sort exists in the case at bar, the "something else" being that the deed and Offer do not carry out the Childs' intentions but are "something else."

The Offer to Sell Land (Ex. C) is executed pursuant (so it says) to the Act of June 18, 1934, 48 Statute 984, which

has apparently been codified in 25 U.S.C.A. 463, 464 and 465. The final paragraph of the Act states as follows:

> "Title to any lands or rights acquired pursuant to Sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title shall be taken in the name of the United States in trust for the Indian Tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxaction." (Emphasis supplied)

The above-quoted provision restricts the authority of the United States Government to accepting land in the name of the United States in trust for a specified tribe or individual Indian. It is legally impossible for the United States Government to accept land under the authority of this statute and hold it for a group of Indians. The court found that the evidence established that the desire of Mr. Childs was to keep his ranch intact and insure the benefits thereof for his children and descendants (F.F. XIII, R. 413). An arrangement such as Mr. Childs requested could not be made under the authority of the Act of June 18, 1934.

25 U.S.C.A. 469 provides as follows:

> "§ 469. Indian corporations; appropriations for organizing
>
> "There is hereby authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, such sums as may be necessary, but not to exceed $250,000 in any fiscal year, to be expended at the order of the Secretary of the Interior, in defraying the expenses of organizing Indian chartered corporations

> or other organizations created under sections 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, and 479 of this title. June 18, 1934, c. 576, § 9, 48 Stat."

These statutes, amongst others, are quoted to show the complexitites of Federal Indian law and the apparent inability of laymen to understand the same or to explain the law to other laymen for the purpose of seeing if said laws are applicable in formulating an estate plan such as Martha and Tom Childs should have -- not what the Government maintins they should have and knowingly created.

Of further importance in considering the authority to carry out the wishes of Thomas Childs it is necessary to look to the Constitution and By-Laws of the Papago Tribe (Ex. 3). Article VIII thereof regulates and controls the use of land acquired thereunder. There does not appear to be a single section in this Article, or in the Constitution, which gives the authority to the Council to acquire and hold land for the sole benefit and use of a specific group of Indians. It should further be noted that there was no evidence that the Papago Council ever passed an ordinance in an effort to allot the Childs' Ranch to the Childs' children in accordance with the Papago Constitution. Section 3(a) of Article VIII would require an ordinance passed by the Papago Council and approved by the District Council.

In view of the requirements of the above-quoted Act of June 18, 1934 and the restrictions set forth in the Constitution and By-Laws of the Papago Tribe, Arizona, there were no statutory provisions which the Government could use in furthering the true intent and desires of Thomas and Martha Childs.

Burton Ladd has conclusively demonstrated this contention and the substance of his testimony indicated that an outright deed in trust to the Papago Tribe would defeat Mr. Childs' intent and purpose, and that the Government couldn't have accepted a deed for the Tribe in any other form (Tr. 350). Burton Ladd doesn't want the Government to make a mistake, but the Government agents, as is conclusively shown by the evidence, have influenced the Childses into a transaction that it not their intent.

The Restatement of Trusts, Second (1957), Sec. 333, page 149, states:

> "A trust can be rescinded or reformed upon the same grounds as those upon which a transfer of property not in trust can be rescinded or reformed.
>
> "e. Mistake. The settlor can rescind a trust created by him as a result of a material mistake. Where no consideration is paid for the creation of the trust, it is sufficient that the settlor was induced by mistake to create the trust, although neither the trustee nor the beneficiary shared in the mistake or knew of it, since in the case of gratuitous transfers a mistake by the transferor is a sufficient ground for setting aside the transfer, although the mistake was not caused or shared by the transferee and he did not know or have reason

> to know of the mistake of the transferor. On the other hand, where the owner of property receives consideration for making a transfer of the property in trust, the rules applicable to transfers for value and to contracts are applicable, and the fact that the owner made the transfer under a mistake is not of itself a sufficient ground for setting aside the transfer. See Restatement of Contracts, § 503. The settlor cannot rescind the trust if the beneficiary has so changed his position without notice of the grounds for rescission that it would be inequitable to permit the settlor to rescind. Compare § 292."

RESPONSE TO SPECIFICATION OF ERRORS 1, 6, 7 and 15

This third area that the Government covers in its Specification of Errors refers to its Specifications 1, 6, 7 and 15, which relate to the fiduciary relationship existing between the parties and the court's Finding that the Government failed to advise or insist that the Childses have the benefit of independent legal advice (not that it was required to provide legal advise as set forth in Specification of Error No. 1).

SUMMARY OF ARGUMENT

> The United States, acting through its representatives, as the court correctly found, stood in a position of a quasi fiduciary relationship with Tom and Martha Childs.

The Government states that the trial court erred in concluding that the United States was <u>required</u> to provide independent legal advice to Martha and Tom Childs. The Government has not accurately stated a portion of the court's Finding,

which reads as follows:

> "The United States failed to advise, or insist as (it) should have done, that Martha and Tom Childs have the benefit of independent legal advice regarding the documents before they allegedly transferred irrevocably the ranches to the United States in trust for the Papago tribe." (F.F. XII, R. 413)

As pointed out herein, these documents were prepared after Mr. Wagner and Mr. Lusher conferred with the Childses and as laymen it is obvious that they were not competent to give legal advice and assume to act as legal advisors. The fact that the Government lawyer, Mr. Sanford, prepared these documents in Phoenix, Arizona without first conferring with the Childses, supports the Appellees' position rather than refuting the same. A Government lawyer, or agents assuming the roll of lawyers, cannot serve two task masters any more than non-government attorneys can.

The Government also contends that it would be error to suggest that "every time Government officials deal with any individual where there is a friendly relationship with that individual, any transaction is subject to attack if the government does not tell him to consult a lawyer."

Appellees contend that in this instance the court has correctly found that the government owed a greater fiduciary duty to Martha and Tom Childs than that which was rendered (Oral Decision, p. 11) (F.F. XVI, R. 415).

The trial court considered that Martha Childs is a Papago and her children are half Papago. The Government assumes because Mr. Childs is Caucasian that this insulates him from any requirements of good faith and competence on the part of the Indian agents, Mr. Lusher and Mr. Wagner, whom, as laymen, assumed the role of Childs' legal advisors (Oral Decision, p. 8).

The testimony of said agents shows that after their discussion with Mr. Childs they went to Phoenix to see Mr. Sanford the attorney for the Bureau of Indian Affairs, and instructed him what they felt should be done. Mr. Sanford then put in legal terms the Offer (Ex. C) without first conferring with the Childses to determine what their legal requirements were. The Government, in its brief (p. 17) concludes that the documents were prepared incorporating his request. Remembering that Tom Childs was not formally educated nor schooled in the law, it cannot be assumed by any stretch of the imagination that his entire request was contained in the documents. It would be difficult for Mr. Lusher, Range Examiner, to discuss this with Mr. Burge and Mr. Wagner, all laymen, have it typed in Phoenix (Tr. 67) and submitted to the agency at Sells and sent back to Phoenix (Tr. 67) without ever having someone with legal training discuss the requirements of the Childses.

When the Government asserts that there is nothing in the

record to show the confidential or fiduciary relationship, they ignore the fact that the Government agents not only did prepare the Offer and deed for the Childses, but Mr. Lusher, his trusting friend in whom he reposed great confidence, related as follows:

By Miss Diamos.

"Q Now, did she -- strike that.

"Did you take part, after this, in meetings with Tom Childs about drawing up a Will?

"A Yes.

"Q And did he ever, to your knowledge, execute a Will that you or Mr. Ladd assisted to draw?

"A He never executed a Will that I know of, except this later date when -- the last year when you showed me his final Will and Testament, but otherwise, many Wills were prepared for him, but not one that I know of that was executed by him.

"MISS DIAMOS: Now, if the witness could be handed plaintiff's Exhibit 15.

"Q Do you recognize any writing on there?

"A Yes, it's my writing on pencil notes on the side of this instrument.

"Q Was that Will ever executed, to your knowledge?

"A No, this is stated, 'Sample received, Bureau of Indian Affairs, November 9, 1948,' and the explanation that we made in here, he had changed John Thomas Childs as executor and he wanted Philip's name inserted, so I put in, in pencil, and sent it to the Phoenix Area Office where Sanford or whoever would be the solicitor would rewrite, if there were any changes, and send it back to Tom Childs." (Tr. 389-390).

In Informal Decision No. 508, dated March 22, 1962, of the American Bar Association's Standing Committee on Professional Ethics, it was held improper for an attorney, when the information pertaining thereto was furnished by a broker or title company, to prepare deeds, contracts and mortgages. The Opinion states that such a transaction lacks the personal contact that should exist between the attorney and client. "Such relationship is necessary to a proper representation of any kind."

The Committee's Opinion goes on further to say "It seems almost impossible for a lawyer to properly prepare a deed, contract or mortgage in total ignorance of existing problems and with no opportunity to discuss the situation with his client. *** Most buyers or sellers would assume that the instruments had been prepared to the best of the lawyers professional ability. Thus misrepresentation might occur or serious misunderstanding result." (Emphasis supplied).

While the trial court found that Mr. Childs was an intelligent, self-educated individual, it also found that he was unschooled in the technicalities of the law and legal problems encountered in transferring land and planning estates, and relied on the Indian agents to effect his desires to benefit his children and grandchildren (F.F. X, R. 412). His inability to understand the technicalities of the transaction at bar is

evidenced by the testimony of Arthur Lusher, the Government Range Examiner, who stated (Tr. 36-37):

"Q (By Miss Diamos) What was said to the best of your recollection, Mr. Lusher?

"A To the best of my recollection, my first knowledge was a mention by Mr. Childs of what he wanted and then later, probably at another one he mentioned it again and then when I saw he was serious and such, I did tell him that I would help him in every way I could to do or attain what he wanted to attain, but first I had to get permission from the Superintendent at Sells, who was my immediate supervisor, and then depending on that I would go ahead and help him how ever I could.

"Q Sir, what was said, what was this first reference, second reference, and third reference, what was said to the best of your recollection?

"A That he was getting to be an old man and that he was worried about what would happen to his land when he was gone. That he wanted -- that he would like to have me help him make out a Will or whatever was necessary in order to turn his property over to the Papago Tribe and that in order to do this he wanted to attain one very important thing, and that was that <u>his children would have full rights to those lands for as long as they lived</u> and that somebody else -- that is what it amounted to, meaning the Papago Tribe and the Government or such, <u>he did not understand such things</u>. But in the meantime would pay the taxes and see that the lands would not be lost and that his children would always have then through their lives a place to live and do whatever they wished on and then when they were gone, he could see no farther than that. And I asked him what he wanted in regard to his grandchildren and such, as far as he was concerned, and he said they would become then members of the Papago Tribe. And of course that was in the original discussion. And they would have all rights to that land and other lands of the Papago like any other Papago individual. But that his one great concern was that his children

> would have that land for a first right on it for as long as each and every one of them lived. And any income therefrom and so on and such, any of that, for as long as they lived. That is the best I can say." (Emphasis supplied)

Thus it has been established by the Appellant, through its own witness, that Childs did not understand what amounted to a complicated estate planning and that Mr. Lusher didn't have the competence to transmit to the government attorney what Mr. Childs was attempting to do.

In the case of KUMMROW v. BANK OF FERGUS COUNTY, 188 P. 649 (Mont. 1920), the Plaintiff filed suit to cancel a deed which she thought was a "water right location notice." The Plaintiff was unable to read or write and relied upon the representation of the parties who explained the instrument and its contents and purposes to her. The Court stated, on page 651:

> "Here one of the parties was the United States Commissioner, assisting plaintiff in making her final proof, who is alleged to have made a portion of the representations, by reason of which she asserts she was deceived. Certainly those entrusted with the duty of assisting public land claimants in perfecting title to such land occupy relations of trust and confidence toward entrymen who by law transact business relating to offices."

The word "fiduciary relationship" includes legal relations, such as attorney and client, principal and agent, guardian and ward, and the like, and also every case in which a fiduciary relation exists in fact, where confidence is reposed on one

side and domination and influence result on the other. The relation need not be legal, but it may be either moral, social, domestic, or merly personal. (WENNERHOLM v. WENNERHOLM, 46 N.E.2d 939, 943, 944, 382 I11. 254) (16-A Words and Phrases 85).

Ordinarily a "fiduciary relationship" arises where one party reposes special confidence in another or where a special duty arises on the part of one to protect the interests of another. CROCKETT v. ROOT, 146 P.2d 555, 559, 560, 194 Okl. 3.

Broadly speaking "confidential relationship" is synonymous with "fiduciary relationship." (KLEIN v. EKCO PRODUCTS CO., 135 N.Y.S.2d 391).

In the case of LILAND v. TWETO, 19 N.D. 551, 125 N.W. 1032 at page 1037, the Court determined that there was a confidential relationship existing between two parties who were not related, but who knew each other and had had previous business dealings. The Court stated as follows:

> "No exact definition can be given as to what is necessary in all cases of this kind to create such relations (confidential relationship), but the trial court evidently had in mind that a marked degree of friendship or close and intimate business dealings must have existed for a time between parties to establish such conditions. This is not the meaning that should be applied in the case at bar. They rather mean that the parties do not meet upon an equality by reason of the extensive knowledge and information of one of them, and the lack of such knowledge and information, and the ability to acquire it of the other party to the trade, and that

> either from the nature of the transaction or surroundings, the complainant was compelled and did place confidence in and rely on the representations made by the respondent. In the instant case, from what we have said, it is clear that Liland did repose confidence in and rely on Tweto's representations, and Tweto's knowledge of his purpose in disposing of his land and investing in the stock. He could not do otherwise if the trade was made, and the statements amounted to representations of fact which were the inducements to Liland to make the exchange. Had he know the true condition of the corporation, he would not have engaged in the transaction." Citations omitted.

In applying the laws above quoted to the facts of the case at bar, it is the position of the Appellees that due to the relationship of each of the contracting parties, the knowledge on the part of the agents of the Government and tribe, the fact that they were represented by counsel, the intent and desire of the Grantors, the confidence of the Grantors in the Government representatives, and the fact that there was great inequality as far as intellectual training and understanding of this particular type of transaction, constitutes a position of "confidential relationship."

It is concomitant that where the donee or third party occupies a confidential relationship toward the donor, a gift to the donee will be scrutinized with care and held valid only on a clear and convincing showing of the utmost good faith and an absence of all undue influence. See AMADO v. AGUIRRE, 62 Ariz. 213, 161 P.2d 117, 160 A.L.R. 1126. In the Arizona

case, supra, the Arizona Supreme Court affirmed a judgment for the defendants because the required elements were not present in Amado. Appellees assert that the Arizona rule applies in this case because there is evidence in the record to show the elements required to vitiate this transaction.

Since the Government and the Papago Tribe can act only through agents, the fact that the Government agents did not benefit is immaterial. It is of no consequence by whom the undue influence was exercised -- whether by a beneficiary or an outsider. The effect was the same. ADDIS v. GRANGE, 358 I11. 127, 192 N.E. 774, 96 A.L.R. 607. The duty is upon the beneficiaries to vindicate the bargain or gift from any shadow of suspicion and to show that it was perfectly fair and reasonable in every effect, and the courts will scrutinize such transactions with great severity. ADDIS v. GRANGE, supra.

Thus it can be seen that the relationship between Thomas Childs and his wife, Martha Childs, and those who assisted and counseled them occupy the position of a fiduciary and the fact that Tom Childs is not a Papago Indian is immaterial, since he, his wife, and his twelve children are the object for which protection is sought.

A trust can be rescinded or reformed as is seen from the following languate of the Restatement of Trusts, Sec. 333, comment c, page 149:

> "c. Undue influence. Upon the question whether the settlor has been induced to create the trust by undue influence, the following factors may be of importance: (1) whether and to what extent a fiduciary or confidential relationship existed at the time of the creation of the trust between the settlor and the person persuading him to create the trust; (2) whether it was the trustee, the beneficiaries or a third person who persuaded the settlor to create the trust; (3) the improvidence of the settlor in creating the trust; (4) whether the settlor when he created the trust had independent legal advice; (5) the age, health, business competence, intelligence of the settlor; (6) whether the trust is of such a character that it would be natural for a person in the position of the settlor to create it when not unduly influenced by others."

RESPONSE TO SPECIFICATION OF ERROR NO. 5

The fourth area covered in the Government's Specification of Errors relates to Specification No. 5, being the condition set forth in paragraph 9 (4) of the Offer to Sell.

SUMMARY OF ARGUMENT

> The court was correct in holding that the non-performance of a condition within a reasonable time and prior to the death of the offerers vitiated the contract.

A provision of the Offer (Ex. C) sets forth the length of time the Offer would be open for acceptance. This is found on page 2, paragraph 6 of the Offer to Sell Lands to the United States as follows:

> "*** This offer shall remain open for 6 months, and shall remain open an addi-

> tional 3 months, unless 30 days prior to the original expiration date notice is communicated to the Secretary that his extension shall not be effective."

A resolution was passed on April 4, 1947 (Ex. B) by the Papago Council, whereby the Council agreed to accept the conditions of the Offer of Thomas and Martha Childs. One of the conditions imposed by them was that their children be enrolled as members of the Papago Tribe. (See conditions 4 and 6 in paragraph 9 of Exhibit C). It should be noted that the terms of the Offer do not state that a promise to adopt the children or a resolution to adopt the children is satisfactory. The conditions stated that the conveyance is contingent upon the enrollment of the Grantors' children into the Papago Tribe, and therefore one of the conditions of the Offer and the trust was the act of adoption, not the promise. This act of adoption was performed almost eleven years after the Offer was terminated by its own terms or by the death of both Grantors or the execution of the Will of Grantor Thomas Childs, showing his intent to withdraw the Offer.

This act was not performed until 1958. Since the act of acceptance (enrollment) did not take place within the specified period of the nine months or even within the lives of the Grantors, the condition precedent did not occur and the trust never vested but failed, entitling the heirs of the Grantors

to the estate in accordance with the Will of Thomas Childs.

See also NESBITT v. EISENBERG, 139 S.2d 724 (Fla. 1962); LANGE v. HOUSTON BANK AND TRUST COMPANY, 194 S.W.2d 797, 801 (C.C.A., Tex. 1948).

If the Offer and the trust conveyance are construed to be subject to a condition subsequent (the enrollment), the trust must fail and the interest revert to the heirs of the Grantors. A leading Arizona case dealing with a contingent trust is DREYER v. LANGE, 74 Ariz. 39, 243 P.2d 468 (Ariz. 1942). In the Dreyer case, the settlor conveyed all of her property to the trustee with the reservation of a designated income for life. She further reserved the right to designate the beneficiaries under the trust, either by will or other suitable instrument in writing. Then she stated in the trust agreement that if she did not so designate the beneficiaries, the corpus of the trust would go to her heirs on the Dreyer side of her family. The trust instrument contained this sentence:

> "This trust shall be considered to be irrevocable."

The Plaintiff sought to revoke the trust. On page 469, the Court pointed out that the counsel agreed to one element of the law:

> "...that if appellee (settlor) is the sole beneficiary under the trust created, she has the right to revoke it at any time whether the purposes of the trust have been accomplished or not and even though the trust is declared to be irrevocable."

The Court reasons on page 470 that legal title to the property vested in the trustee during the life of the settlor, but there was no vested interest in any one other than the settlor as far as beneficiaries are concerned for the reason that there was a condition which must occur or a contingency which must occur prior to the vesting; namely, the act of designating the beneficiaries. The Court states on page 471, as follows:

> "We therefore hold that unless a conveyance of an expectant estate in trust is based upon a contingency that must inevitably happen, no vested interest in a future estate is created and that the person named therein does not become a beneficiary in law until the contingency happens."

The case at bar is very similar. An offer was executed which was to remain open for a period of nine months. The trust would vest upon the happening of a contingency; namely, the enrollment of the children of the Grantors as members of the Papago Tribe. As in the Dreyer case (supra), this was a contingency that might never occur. In fact, the enrollment of the children did not occur until eleven years after the Offer was made and seven years after the death of the Grantors. The important element, though, is that it might never have occurred. As the Court points out in the Dreyer case, since it is a contingency that may never occur, there is no vested interest.

If the Court construes, in the case at bar, the Offer between Thomas and Martha Childs, which was signed on February

10, 1947, to be an offer to create a trust in return for the consideration that the children of Thomas and Martha Childs be enrolled as members of the Papago Tribe, and the Court then determines that this enrollment did not take place within the time period (nine months) as set forth in the contract, the Offer was terminated by the end of the nine months' period and the trust failed for lack of consideration leaving Appellant unentitled to any relief. The failure of consideration is such as to affect and defeat the object of the contract.

If the Offer of the Grantors and the instrument of conveyance are interpreted to be the creation of a trust subject to a condition precedent and the condition did not occur within the time specified, the trust fails.

In the case of LANE v. LOUIS TRUST COMPANY, 201 S.W.2d 288 (Mo. 1947), the decedent established a trust fund for her husband with an agreement that if she predeceased him he would be entitled to the trust fund if he waived his right in writing to any interest he might have in the remainder of her estate. The Court determined that there was no vested interest in the trust due to the fact that the act of waiver by the husband constituted consideration for the offer and that since this act was not performed within the necessary time, there was no consideration for the agreement, the trust interest never vested and therefore failed and finally the trust fund was directed to

to be distributed to her heirs. The Court states, on page 290, as follows:

> "The trust instrument did not grant to the husband any vested interest in the wife's property or in the trust fund. It did not amount to a contract. It was an offer by her to him that if he survived her he could take the trust fund upon consideration that he waive his marital rights in her estate. In order for the offer to be translated into a binding contract between the surviving husband and his wife's estate, there must have been, at the time of acceptance, a valid consideration upon which the contract could rest."

The resolution passed on April 4, 1947 did not constitute an acceptance of the Offer. The Supreme Court of the State of Arizona, in the case of CLARK v. COMPANIA GANADERA DE CANANEA, S.A., 385 P.2d 691, 92 Ariz. 391, opinion supplemented 387 P.2d 235, 95 Ariz. 90 (1963), states, on page 697, as follows:

> "An acceptance must comply exactly with the requirements of the offer, omitting nothing from the promise or the performance requested. Restatement, Contracts, Section 59 (1932)."

The Court goes on to approve this principle of law:

> "It is the position of the appellees that should there be found an acceptance, it was, nevertheless, not communicated to Texas Order Bind Co. and without the communication of the acceptance of an offer, the contract does not come into being, Groskin v. Bookmyer, 310 Pa. 588, 166 A. 233 (1933)."

In the case at bar, the acceptance of the Offer was expressly made to be contingent upon the act of enrolling the children of the Grantors as members of the Papago Tribe within

the specified time limit, nine months. The Government has admitted that no notice of the enrollment of the children was ever given to them or to anyone else.

Nowhere in the record can any criticism be made against Thomas or Martha Childs, although the Appellant, on page 13 of its brief, seems to believe that some detriment was suffered by Appellant or the Tribe because the 1940 tribal census supposedly included the children. This position is untenable because if the children already had some rights of formal enrollment in 1940, why did the government attorney put this as a condition in the Offer in 1947, and why was formal enrollment enacted by a resolution in 1958?

The death of the offerer terminates the offeree's power of acceptance. In the case at bar, both of the offerers were deceased prior to the acceptance of the Offer by the enrollment of the Offerers' children as members of the Papago Tribe.

Corbin, in his Treatise on Contracts, Vol. 1, Section 54, states as follows:

> "It is very generally said that the death of the offerer terminates the offeree's power of acceptance even though the offeree has no knowledge of such death."

See also: 17 Am.Jur.2d, Contracts, Sec. 38, p. 377.

CONCLUSION

The Court, in its 16 Findings of Fact and 9 Conclusions of Law, has approached every aspect of the case that was found

to be in issue. The Court has considered the issues of undue influence, quasi-fiduciary relationship, the condition in the Offer to enroll the children, the entire Offer and deed, the circumstances surrounding the transaction, the consideration, the ambiguity, the failure of performance, the intent of the parties, and every other facet of the case. In addition, the Court considered the preparation of the documents and it is basic Horn Book law that the documents are construed most strongly against the person who prepared them -- in this instance the Government.

It is inescapable that the Court, in Conclusion III, concluded that there was no meeting of the minds between Thomas Childs, Jr. and his wife, Martha, and the plaintiff with relation to the transaction. Perhaps the Court could have decided the case only on this issue, but it felt compelled to view all of the issues as it has done.

Based upon the trial court's findings of fact, which are amply supported by a preponderance of the evidence, and the rules of law applicable to those facts, as set forth in this brief, Appellees respectfully pray that the Judgment entered by the United States District Court for the District of Arizona, sitting at Tucson, Arizona, be affirmed.

Respectfully submitted

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Attorneys for Appellees

CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Frank H. Watkins

Frank H. Watkins, Attorney